United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

75-4132

United States Court of Appeals

For the Second Circuit

No. 75-4132

WESTERN UNION INTERNATIONAL, INC., *Petitioner,*

—against—

THE FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents,*

—and—

THE WESTERN UNION TELEGRAPH COMPANY, STATE OF HAWAII and ITT WORLD COMMUNICATIONS INC., *Intervenors.*

PETITION FOR REVIEW OF A MEMORANDUM OPINION AND ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR PETITIONER WESTERN UNION INTERNATIONAL, INC.

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TABLE OF CONTENTS

Table of Authorities

PAGE

I. Cases

II. *Statutes*

PAGE

III. *Legislative Materials*

A. Reports

B. Hearings

PERTINENT STATUTES

All references are to the Communications Act of 1934, as amended.

Section 214, 47 U.S.C. § 214:

> (a) No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line. . . .

* * * * *

Section 222, 47 U.S.C. § 222:

> (a) As used in this section—
>
> (1) The term "consolidation or merger" includes the legal consolidation or merger of two or more corporations, and the acquisition by a corporation through purchase, lease, or in any other manner, of the whole or any part of the property, securities, facilities, services, or business of any other corporation or corporations, or of the control thereof, in exchange for its own securities, or otherwise.
>
> (2) The term "domestic telegraph carrier" means any common carrier by wire or radio, the major portion of whose traffic and revenues is derived from domestic telegraph operations; and such term includes a corporation owning or controlling any such common carrier.
>
> (3) The term "international telegraph carrier" means any common carrier by wire or radio, the major portion of whose traffic and revenues is derived from international telegraph operations; and such term includes a corporation owning or controlling any such common carrier.

(4) The term "consolidated or merged carrier" means any carrier by wire or radio which acquires or operates the properties and facilities unified and integrated by consolidation or merger.

(5) The term "domestic telegraph operations" includes acceptance, transmission, reception, and delivery of record communications by wire or radio which either originate or terminate at points within the continental United States, Alaska, Canada, Saint Pierre-Miquelon, Mexico, or Newfoundland and terminate or originate at points within the continental United States, Alaska, Canada, Saint Pierre-Miquelon, Mexico or Newfoundland and includes acceptance, transmission, reception, or delivery performed within the continental United States between points of origin within and points of exit from, and between points of entry into and points of destination within, the continental United States with respect to record communications by wire or radio which either originate or terminate outside the continental United States, Alaska, Canada, Saint Pierre-Miquelon, Mexico, and Newfoundland, and also includes the transmission within the continental United States of messages which both originate and terminate outside but transit through the continental United States: *Provided,* That nothing in this section shall prevent international telegraph carriers from accepting and delivering international telegraph messages in the cities which constitute gateways approved by the Commission as points of entrance into or exit from the continental United States, under regulations prescribed by the Commission, and the incidental transmission or reception of the same over its own or leased lines or circuits within the continental United States.

(6) The term "international telegraph operations" includes acceptance, transmission, reception, and delivery of record communications by wire or radio which either originate or terminate at points outside the continental United States, Alaska, Canada, Saint Pierre-Miquelon, Mexico, and Newfoundland, but does not include acceptance, transmission, reception and delivery performed within the continental

United States between points of origin within and points of exit from, and between points of entry into, and points of destination within, the continental United States with respect to such communications, or the transmission within the continental United States of messages which both originate and terminate outside but transit through the continental United States.

* * * * *

(10) The term "continental United States" means the District of Columbia and the States of the Union, *except Hawaii.* (emphasis added)

(b) (1) It shall be lawful, upon application to and approval by the Commission as hereinafter provided, for any two or more domestic telegraph carriers to effect a consolidation or merger; and for any domestic telegraph carrier, as a part of any such consolidation or merger or thereafter, to acquire all or any part of the domestic telegraph properties, domestic telegraph facilities, or domestic telegraph operations of any carrier which is not primarily a telegraph carrier: *Provided,* That, except as provided in paragraph (2) of this subsection, no domestic telegraph carrier shall effect a consolidation or merger with any international telegraph carrier, and no international telegraph carrier shall effect a consolidation or merger with any domestic telegraph carrier.

(2) As a part of any such consolidation or merger, or thereafter upon application to and approval by the Commission as hereinafter provided, the consolidated or merged carrier may acquire all or any part of the domestic telegraph properties, domestic telegraph facilities, or domestic telegraph operations of any international telegraph carrier.

(c) (1) . . . (2) *Any proposed consolidation or merger of domestic telegraph carriers shall provide for the divestment of the international telegraph operations theretofore carried on by any party to the consolidation or merger,* within a reasonable time to be fixed by the Commission, after the consideration for the property to be divested is found by the Commission to be commensurate with its value, and as soon as the legal obligations, if any,

of the carrier to be so divested will permit. The Commission shall require at the time of the approval of such consolidation or merger that any such party exercise due diligence in bringing about such divestment as promptly as it reasonably can. (emphasis added).

* * * * *

(e) (1) In the case of any consolidation or merger of telegraph carriers pursuant to this section, the consolidated or merged carrier shall, except as provided in paragraph (2) of this subsection, distribute among the international telegraph carriers, telegraph traffic by wire or radio destined to points without the continental United States, and divide the charges for such traffic, in accordance with such just, reasonable, and equitable formula in the public interest as the interested carriers shall agree upon and the Commission shall approve: *Provided, however,* That in case the interested carriers shall fail to agree upon a formula which the Commission approves as above provided, the Commission, after due notice and hearing, shall prescribe in its order approving and authorizing the proposed consolidation or merger a formula which it finds will be just, reasonable, equitable, and in the public interest, will be, so far as is consistent with the public interest, in accordance with the existing contractual rights of the carriers, and will effectuate the purposes of this subsection.

* * * * *

Section 314, 47 U.S.C. § 314:

After the effective date of this chapter [1934] no person engaged directly, or indirectly through any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, such person, or through an agent, or otherwise, in the business of transmitting and/or receiving for hire energy, communications, or signals by radio in accordance with the terms of the license issued under this chapter shall by purchase, lease, construction, or otherwise, directly or indirectly, acquire, own, control, or operate any cable wire telegraph or telephone line or system between any place in any State, Territory, or possession of the United States or in the

District of Columbia, and any place in any foreign country, or shall acquire, own, or control any part of the stock or other capital share or any interest in the physical property and/or other assets of any such cable, wire, telegraph, or telephone line or system, if in either case the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or unlawfully to create monopoly in any line of commerce; nor shall any person engaged directly, or indirectly through any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, such person, or through an agent, or otherwise, in the business of transmitting and/or receiving for hire messages by any cable, wire, telegraph, or telephone line or system (a) between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any other State, Territory, or possession of the United States; or (b) between any place in any State, Territory, or possession of the United States, or the District of Columbia, and any place in any foreign country, by purchase, lease, construction, or otherwise, directly or indirectly acquire, own, control, or operate any station or the apparatus therein, or any system for transmitting and/or receiving radio communications or signals between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or shall acquire, own, or control any part of the stock or other capital share of any interest in the physical property and/or other assets of any such radio station, apparatus, or system, if in either case the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or unlawfully to create monopoly in any line of commerce.

United States Court of Appeals
For the Second Circuit

Docket No. 75-4132

WESTERN UNION INTERNATIONAL, INC.,
Petitioner,

—against—

THE FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,
Respondents,

—and—

THE WESTERN UNION TELEGRAPH COMPANY, STATE OF HAWAII and ITT WORLD COMMUNICATIONS INC.,
Intervenors.

BRIEF FOR PETITIONER WESTERN UNION INTERNATIONAL, INC.

I. Statement of the Issue Presented for Review

In light of the requirement of Section 222 of the Communications Act that The Western Union Telegraph Company ("WUTelCo") divest itself of its international telegraph operations as a condition of acquiring competitive domestic telegraph operations and becoming a domestic monopoly, may WUTelCo, following such divestment, be authorized by the Federal Communications Commission to re-enter international telegraph operations, by providing a telegram service called "mailgram" between the United States Mainland and Hawaii, an "international" point under the Communications Act?

II. Statement of the Case

A. The Prior Proceedings

In 1943, WUTelCo accepted the benefits of Section 222 of the Communications Act, 47 U.S.C. § 222, and merged with its principal competitor in the domestic telegraph field, The Postal Telegraph Company ("Postal Telegraph"). WUTelCo thereupon became obligated to divest itself of its international telegraph operations, and to do so within a reasonable time. 47 U.S.C. § 222(c)(2). Twenty years later, WUTelCo divested. A new entity, Western Union International, Inc. ("WUI"), was formed and, in September 1963, acquired WUTelCo's international telegraph business. WUI then became an "international telegraph carrier" under the Communications Act. WUI and WUTelCo are separate, independent companies.

On April 4, 1972, WUTelCo sought to re-enter international telegraph operations by applying to the FCC for authority under Section 214(a) to lease international facilities to provide mailgram telegraph service between the United States Mainland and Hawaii, an "international" point under Section 222(a)(10). (A71-103*) The FCC's Common Carrier Bureau, on April 19, 1972, rejected WUTelCo's application, ruling that Section 222 precluded WUTelCo from furnishing international telegraph services and that the FCC, in the absence of a Congressional amendment of the statute, lacked authority to consider WUTelCo's application. (A61-70)

On May 19, 1972, WUTelCo petitioned the FCC for review of the Bureau's ruling. Three years later, without conducting a hearing at which evidence could be presented or the issues argued, the FCC reversed. By a Memorandum Opinion and Order released on June 23, 1975, the FCC directed its Common Carrier Bureau to accept and consider

* The parenthetical reference and all further such references are to pages in the Appendix.

WUTelCo's 1972 application. (A7-60)* On June 30, 1975, WUTelCo filed an amended application, which the Bureau (pursuant to the FCC Order) accepted.** WUTelCo intends, as well, to file applications for authority to transmit mailgrams to and from additional international points in Europe and Asia.***

On July 2, 1975, pursuant to 28 U.S.C. § 2343, WUI filed this petition for review of the FCC Order. (A1-6)* * * *

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* The FCC Order is reported at 55 F.C.C. 2d 668.

** WUTelCo's amended application requested authority to lease international channel facilities between Hawaii and the United States from an international telegraph carrier, such as RCA Global Communications, Inc. ("RCA").

*** WUI instituted a lawsuit against WUTelCo for violating the non-compete clause in the agreement by which WUTelCo divested its international telegraph operations. In that proceeding, WUTelCo's Vice President, General Counsel and Secretary stated that WUTelCo "had preliminary communications for the rendition of Mailgram service . . . with certain governments, governmental agencies or telecommunication entities in Europe and in Asia. . . ." Affidavit of Richard C. Hostetler, sworn to on October 17, 1975, para. 7, filed in *Western Union International, Inc.* v. *Western Union Telegraph Co.*, 75 Civ. 3783 (C.E.S.) (S.D.N.Y.). In addition, a recent pleading filed by WUTelCo with the FCC on November 3, 1975, stated:

> "Since the Commission's ruling of June 23, Western Union [WUTelCo] has been in the process of contacting foreign governments on the subject of international Mailgram, with a view to filing appropriate applications for authority to provide such service. Western Union fully expects to file such applications in the near future." Opposition to Petitioners, dated November 3, 1975, p. 3, filed by WUTelCo in *Matter of ITT World Communications Inc.* and *Matter of Western Union International, Inc.*, FCC File No. T-C-2618.

**** WUI also filed a petition with the FCC asking for a stay of further proceedings on WUTelCo's application pending the final disposition of this petition for review. The stay was denied by the FCC in a decision released October 3, 1975, but with the comment that further proceedings would be structured so that undue extra expense would not be caused to the parties while they waited for this Court's decision. (Memorandum Opinion and Order, File No. 1-T-C-2618, FCC 75-1109) In the meantime, upon the urging of the FCC, the several carriers seeking to provide a mailgram service to Hawaii have been negotiating a temporary arrangement for mailgram service between the United States Mainland and Hawaii, to be furnished by them on a joint basis until this Court decides the instant petition for review, without prejudice to any party's rights.

WUTelCo, the State of Hawaii and ITT World Communications Inc. ("ITT") have intervened. (A279-319)

3. Historical Background

The Communications Act defines two categories of telegraph carrier, "domestic" and "international". 47 U.S.C. § 222(a)(2),(3). Since the merger of WUTelCo and Postal Telegraph in 1943, WUTelCo has been the sole domestic telegraph carrier. Because, by statutory definition, the acceptance and delivery of international communications are reserved to the domestic carrier, the international carriers must depend on WUTelCo to originate and deliver the bulk of their telegraph messages.*

It had become clear by the late 1930's that the two domestic companies, WUTelCo and Postal Telegraph, could not continue to co-exist. Congress, the FCC and the affected companies all considered that merger was the appropriate remedy. Section 222 was enacted to create an appropriate exemption for WUTelCo from the antitrust laws, as largely reflected in Section 314 of the Communications Act. WUTelCo thus was made eligible to acquire Postal Telegraph, as well as all domestic telegraph operations of carriers which were not primarily domestic telegraph carriers, e.g., the teletypewriter exchange service (TWX) and the domestic private line network by American Telephone and Telegraph Company ("A.T.&T."), and the domestic radio telegraph operations of the international telegraph carriers, RCA and Mackay Radio & Telegraph Co. (now a part of ITT). 47 U.S.C. § 222(b)(1), (2). In sum, WUTelCo was given a continuing opportunity, free from antitrust limitations, to acquire and operate competing domestic telegraph services.

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* 47 U.S.C. § 222(a)(5),(6). There are three major international telegraph carriers, WUI, ITT and RCA, and several smaller ones. They are permitted under Section 222(a)(5) to handle traffic with the domestic public only in designated "gateway" cities—New York, San Francisco and Washington, D.C. for the major carriers.

The creation of the merged domestic carrier posed a grave threat to the international carriers. The merged domestic telegraph carrier would have the power, through its control over the originating and terminating portions of international traffic, to discriminate among the international telegraph carriers and to prefer its own international operations over those of the other international carriers. Section 222 thus further provided that in the event the domestic telegraph carriers merged, the resulting carrier had to divest itself of its international operations, 47 U.S.C. § 222(e)(2), and distribute traffic among the international carriers equitably, according to a formula regulated by the FCC, 47 U.S.C. § 222(e)(1).*

WUTelCo and Postal Telegraph merged promptly following enactment of Section 222. As also contemplated and authorized by Section 222(b)(1) [47 U.S.C. § 222(b)(1)], WUTelCo acquired A.T.&T.'s TWX system in 1971, thus obtaining a "virtual monopoly" over domestic teletypewriter exchange (telex and TWX) and telegram services. *International Record Carrier's Communications,* 38 F.C.C. 2d 543, 546 (1972).**

After taking advantage of the benefits of Section 222 which permitted it to merge with Postal Telegraph and to acquire TWX from A.T.&T., and after finally divesting itself of all its international telegraph operations, WUTelCo now wishes to engage again in an international telegraph operation.*** WUTelco took 20 years to comply with the Congressional command. Without a change in legislation, WUTelCo now seeks to do what Congress said it cannot do. The spearhead of WUTelCo's effort is mailgrams.

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* Until divestment, WUTelCo's Cable Division, which conducted its international telegraph operations, was to be treated as a separate "international telegraph carrier" under the Act. 47 U.S.C. § 222(e)(4).

** The domestic radio telegram operations of RCA and ITT, which the statute also authorized WUTelCo to acquire, were closed during World War II and not reopened.

*** It should be emphasized that the merger proviso was permissive, not mandatory. WUTelCo's divestment obligation only became operative after WUTelCo's election to merge.

C. Mailgrams Described

Mailgrams are telegram messages which are accepted and transmitted by WUTelCo offices and facilities in essentially the same way as other telegram messages. Mailgrams originate, as do other telegram messages, over-the-counter and by telephone, telex or computer; they then are connected by the same transmission lines to the same central WUTelCo computer complex. (A23, 72-74) At destination, in the case of telegrams other than mailgrams, the message is received in typewritten form at a WUTelCo office and delivered by mail, telephone, telex or messenger. In the case of mailgrams, WUTelCo's receiving equipment is installed in a designated post office (rather than a WUTelCo office), where the messages are received in typewritten form and delivered by one of the methods utilized for other telegrams, that is, by the mails. (A24)*

WUTelCo has offered mailgrams domestically for several years. Since 1972, the three leading international carriers, WUI, RCA and ITT, have had applications pending before the FCC to furnish a similar service between the United States Mainland and a number of international points, including Hawaii. These applications still await FCC action.**

D. The Decision of the Common Carrier Bureau

The FCC's Common Carrier Bureau ruled that the transmission of mailgrams between the United States Mainland and Hawaii is an "international telegraph operation" and that Section 222 forbids WUTelCo from providing this service regardless of what an inquiry into the merits might

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* The similarities between mailgrams and other telegrams are discussed again in more detail, *infra* at pp. 30-33.

** Between May 5, 1972 and August 11, 1975, WUI submitted applications to the FCC for authority to provide a mailgram service to Hawaii, Puerto Rico/St. Thomas, Argentina, Brazil, Indonesia, Venezuela and Italy. WUI also desires to provide this service to additional international points, but has not yet filed applications because of the FCC's inaction on WUI's pending applications.

show as to the public interest. (A61-70) The Bureau noted that Congress amended Section 222 in 1960 to make it clear (a) that Hawaii's status as an international point was to be preserved despite its statehood, and (b) that the 1943 prohibition imposed by Section 222 on WUTelCo not to engage in international telegraph operations could not be changed absent a statutory amendment by Congress. Section 222's purpose, the Bureau found, was to restrict WUTelCo to domestic telegraph operations once WUTelCo elected to merge with Postal Telegraph and become the sole domestic telegraph carrier. (A61-70)

WUTelCo argued that it was barred only from engaging in those international telegraph operations that it "theretofore carried on" before 1943, and that mailgrams were not "theretofore carried on." The Bureau rejected the argument as being without merit. It ruled that mailgrams were "basically a telegraph service," competing with other telegraph services. The Bureau stated:

> "WUTC [WUTelCo] argues that MAILGRAM is a new and innovative service which was not theretofore carried on prior to the merger of WUTC and Postal Telegraph and that, consequently, the scope of Section 222 would not encompass or preclude this service. The same argument could have been made for the provision of telex service between the Mainland and Hawaii in 1960, as telex was a new and innovative service which was first offered commercially, on a very limited scale, in the United States in 1958; telex would thus be a service not theretofore offered prior to the merger of WUTC and Postal Telegraph. However, WUTC apparently did not think this argument had merit in 1960 when it requested that Section 222 be amended to allow them to provide telegraph services—including telex—between the Mainland and Hawaii." (A66)
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> * * * * *
>
> "It is obvious from the instant application, that no matter how new or innovative MAILGRAM service may be, it is basically a telegraph service, inasmuch

> as the essential transmission will be performed by WUTC, with delivery by the Post Office at destination. Moreover, it is obvious that MAILGRAM service will be a serious contender for a portion of the present market for message telegraph services between the Mainland and Hawaii presently offered by the international record carriers individually or jointly with Western Union [WUTelCo]." (A67)

The Bureau, quoting from *Telegraph Service with Hawaii,* 28 F.C.C. 599, *aff'd on reconsideration,* 29 F.C.C. 714 (1960), ruled that Congress in Section 222 had forbidden WUTelCo from providing telegraph service to Hawaii "no matter how urgent the public interest," and that the proper course, if change was appropriate, was to "ask Congress to amend Section 222, not for us [the FCC] to misinterpret it."

> " 'We must conclude therefore that in Section 222 Congress intended that, as a condition to its merger with Postal Telegraph, Western Union [WUTelCo], as a domestic telegraph carrier, must withdraw from competition with the international telegraph carriers to overseas points, whether they be foreign points or interstate points under Section 3.' " (A67 quoting 28 F.C.C. at 604.)
>
> * * * * *
>
> " 'Since service to any of these points (i.e., Hawaii, Puerto Rico, and the Virgin Islands) is undoubtedly an international telegraph operation, we cannot order or permit Western Union [WUTelCo] to provide such service, no matter how urgent the public interest. If we find that the public interest requires that we should possess such power, the remedy is to ask Congress to amend Section 222, not for us to misinterpret it.' " (A68 quoting 28 F.C.C. at 605.)

The Bureau thus rejected WUTelCo's 1972 mailgram application, holding that in the absence of an amendment of Section 222, the FCC was without power to consider WUTelco's application to provide international telegraph service to Hawaii irrespective of what an inquiry into the merits mights show as to the public interest.

E. The Decision of the FCC

More than three years after the decision of its Common Carrier Bureau, the FCC reversed. It held that WUTelCo was eligible to re-enter international telegraph operations and directed the Bureau to accept and consider WUTelCo's mailgram application. The FCC so decided *even though it agreed* with the Bureau (a) that mailgrams between the United States Mainland and Hawaii constitute "international telegraph operations" within the meaning of Section 222 (A15-16); (b) that the legislative history of Section 222 shows that Congress intended that WUTelCo, following its merger with Postal Telegraph, divest itself of all interest in international operations in order that the independent international carriers could be adequately protected (A32); and (c) that the divestment clause necessarily meant that WUTelCo could not, after it divested itself of its international operations, again acquire or develop the international telegraph operations which it divested. (A39, 45-46)

The FCC's discussion of the dependency of the international carriers on WUTelCo and the necessity of requiring WUTelCo to divest and to stay out of international telegraph operations warrants quotation:

> "Since the international carriers in 1943 operated only in the gateway cities, they were dependent on WU [WUTelCo] for the bulk of the domestic pick-up and delivery of their PMS* traffic. Thus, WU was in a position virtually to drive an international carrier or carriers out of business were it so inclined. It was in this context that Congress required WU to divest itself of its international operations and enacted the formula provisions. We agree with WUI and RCA that a construction of the divestment provision which would permit WU to re-enter the same international operations the day after it

* PMS is an abbreviation for public message service, the service known to the public as telegrams.

> divested its prior operations would render the requirement meaningless and absurd. It makes no sense, in view of the purpose underlying the divestment clause, to require divestment if WU could re-enter international PMS operations in competition with the IRC's*." (A45-46)

Having thus recognized the importance and scope of the divestment requirement, the FCC proceeded to ignore the considerations it expressed. The FCC ruled that it was not precluded by Section 222 from considering WUTelCo's application to transmit mailgrams to and from Hawaii, or by implication, to and from any other point on the globe. It noted that WUTelCo was required by Section 222(c)(2) to divest its "international telegraph operations theretofore carried on." The FCC recognized that the phrase "theretofore carried on" was intended as no "more than a descriptive phrase," defining that which WUTelCo was required to divest. (A43) The FCC nevertheless ruled that mailgrams were not among the telegraph services that were "theretofore carried on" by WUTelCo in 1943 when Section 222 was enacted. (A33) Thus, the FCC concluded, in the case of mailgrams, WUTelCo was eligible to engage again in international telegraph operations.

In a concurring opinion, Commissioner Charlotte T. Reid stated that the plain language of Section 222 raised questions about the legality of permitting WUTelCo to transmit mailgrams between the United States Mainland and Hawaii. She observed that the "Commission intends to ask Congress" to resolve this question, and that it would have been better to follow "the more conservative route of removing any legal impediment" by asking Congress to amend Section 222. (A59-60)

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* IRC is an abbreviation for "international record carrier" which is a term synonymous with "international telegraph carrier".

F. The Issue Raised by this Petition for Review

This petition for review raises the important, but narrow, legal question of whether or not the FCC correctly interpreted Section 222. As the FCC stated, "a grant of WU's [WUTelCo's] application . . . would involve WU in international telegraph operations, and would represent the first time WU has engaged in such operations since divestment of its international facilities in 1963." (A16)*

The discussion which follows shows that the FCC misinterpreted Section 222 and that its Order, therefore, must be reversed.

III. Summary of Argument

Section 222 permitted WUTelCo to merge with Postal Telegraph to become the sole domestic telegraph carrier and granted WUTelCo the potential to acquire a monopoly of all domestic telegraph operations. Congress mandated that WUTelCo divest itself of its international telegraph operations because Congress determined that continued presence by the merged domestic carrier in international operations was inimical to fair competition in the international sector. The FCC's discretionary latitude was limited in this area to supervising the divestiture and administering a traffic distribution formula to insure that the merged domestic carrier treated the international carriers fairly.

Without any change in legislation, the FCC Order now has abrogated the divestment requirement by holding that WUTelCo may again engage in international telegraph

* The issue is one purely of law which the courts have the ultimate responsibility to decide, especially where, as here, no factual findings are being reviewed. See, *Volkswagenwerk Aktiengesellschaft* v. *FMC*, 390 U.S. 261, 272 (1968); *NLRB* v. *Brown*, 380 U.S. 278, 291 (1965); *American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 318 (1965; *Truck Drivers Local U. No. 807, I.B.T.C., W. & H.* v. *NLRB*, 506 F.2d 1382 (2d Cir. 1974); see also *Gardner, Federal Courts and Agencies: An Audit of the Partnership Books*, 75 Colum. L. Rev. 800, 801-05 (1975).

operations through the acquisition of an international facility to transmit mailgrams between the United States Mainland and Hawaii. The FCC Order is erroneous for the following reasons:

1. The FCC attempts to invoke discretion, denied to it by Congress.

2. The FCC seeks to restrict Section 222 to contemporary conditions existing at the time of its enactment in 1943. Section 222, however, was intended to be ongoing in effect and has given WUTelCo a continuing opportunity to acquire other competing domestic telegraph operations, such as TWX and private leased channel systems of non-telegraph carriers.

3. The FCC concludes that there is no potential for abuse of the kind concerning Congress when the divestment requirement was enacted. However, the potential for abuse by WUTelCo of its domestic position in international operations which exists today should WUTelCo be permitted to engage in international operations, essentially is the same as that which Congress feared in 1943 and which the FCC found had existed on a wide and uncontrollable scale during the period between the WUTelCo-Postal Telegraph merger and the 1963 divestment.

4. The FCC, after noting that the phrase "theretofore carried on" is no more than a descriptive phrase, misapplied it with unwarranted significance. These words were not regarded as words of significance when WUTelCo complied with the divestment requirements in 1963 and divested both its international telegraph operations which it "theretofore carried on" in 1943, and which it developed between 1943 and 1963, and they should not be regarded as controlling today.

5. Mailgrams are indistinguishable from other telegrams, and a different treatment for them under Section 222 cannot be justified.

IV. Argument

The FCC Order should be reversed and the FCC should be directed to reject WUTelCo's mailgram application.

The FCC Order is not in accord with (A) Section 222 and the legislative history which led to its enactment, (B) the decisions of the Courts of Appeals and the FCC interpreting the Communications Act, and (C) the several Congressional actions in the 20 years following the enactment of Section 222 by which Congress repeatedly confirmed its earlier intention. The critical question in this case is not, as the FCC put it, whether mailgram service is a telegraph operation which existed at the time Section 222 was enacted but, simply, whether or not mailgram is a "telegraph operation" as that term is defined in Section 222. Once concluding, as the FCC did, (i) that mailgram is a "telegraph operation" (A15-16) and (ii) that telegraph service between Hawaii and the United States Mainland is "international" (A15), it follows inexorably that WUTelCo, as the merged domestic telegraph carrier of Section 222, is barred as a matter of law from transmitting mailgrams between Hawaii and the United States Mainland. The statute and the legislative history of its enactment and subsequent attempts to change it allow no other conclusion.

A. Section 222 and its legislative history show that Congress intended that WUTelCo divest its international telegraph operations and not thereafter engage in such operations. Congress did not intend to limit that mandate by distinguishing between international telegraph operations that WUTelCo carried on before, and those it carried on after, 1943 and, Congress did not intend to give the FCC any discretion in the matter.

Section 222 became law in 1943. It followed extensive studies by the FCC and Congress, beginning in 1935.* During the 20 years following its enactment, Section 222

* The Congressional and FCC investigations of the telegraph industry which led to the enactment of Section 222 began with an FCC

(footnote cont. on next page)

was the subject of numerous proposals to amend or modify its provisions, including proposals to repeal the divestment requirement. The legislative history before and after Section 222's passage shows clearly that Congress intended WUTelCo to get out, and stay out, of international telegraph operations.*

In this section of the brief, we discuss the legislative history preceding the enactment of Section 222. We show that Congress intended the legislation, not as an *ad hoc* treatment of particular problems in 1943, but as an ongoing charter for the industry, intended to subsume both the technology and services then in being and those thereafter developed. We show that Congress was insistent that WUTelCo give up its international operations, even though it anticipated that there would be difficulties and that it would take some time, perhaps considerable time, for WUTelCo to do so. Congress firmly determined that the position which WUTelCo would gain domestically from the merger with Postal Telegraph would give it an unfair competitive advantage over the international carriers if it had both domestic and international capability—an unfair competitive advantage which Congress decided could not be prevented by FCC supervision.

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preliminary report to Congress in 1935. *Recommendations of Three Proposed Amendments to the Communications Act of 1934, H.R. Doc. No. 83,* 74th Cong., 1st Sess. (1935). *Senate Resolution 95* 76th Cong., 1st Sess. (1939), continued by *Senate Resolution 268,* 76th Cong., 2d Sess. (1940), authorized the FCC to supplement its 1935 report, resulting in the FCC's 1939-40 *Report on the Telegraph Industry, Hearings pursuant to S. Res. 95 Before a Subcomm. of the Senate Committee on Interstate Commerce,* 77th Cong. 1st Sess. 394-481 (1941), and the various subsequent Congressional hearings and reports discussed *infra* at pp. 15-27.

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* The FCC Order recognized that WUTelCo was forbidden to re-enter the international telegraph operations it was required to divest. (A45-46)

1. *Divestment was made a mandatory requirement, not subject to FCC discretion.*

The FCC Order, although noting that Congress mandated divestment because it was concerned that WUTelCo "was in a position virtually to drive an international carrier or carriers out of business," ruled that it nevertheless could not assume that WUTelCo would act unfairly and that, if WUTelCo did, the FCC had "ample authority under the Act" to rectify abuses.(A22, 45) The FCC's ruling misinterpreted the clear Congressional intent that the FCC was to have no discretion to decide whether WUTelCo should be permitted to engage in international telegraph operations. Congress itself decided this question.

In 1941, the Senate Committee on Interstate Commerce, after studying the FCC's 1939-40 *Report on the Telegraph Industry, Hearings pursuant to S. Res. 95, supra* at 394-481 and conducting its own hearings, submitted a Report recommending legislation that would have permitted a merger of domestic telegraph carriers into one entity and a merger among international carriers into a second and entirely separate entity. The legislation proposed by this Senate Report would not have required the merged domestic carrier to divest itself of its international telegraph operations. Instead, the matter of divestment would have been left to FCC discretion, with the agency empowered "eventually to require the merged domestic carrier to restrict itself solely to domestic telegraph operations if found to be in the public interest." *S. Rep. No. 769,* 77th Cong. 1st Sess. 25 (1941).

The matter of divestment, as it developed, was not left to FCC discretion. The first bill drafted by the Committee, S.2445, introduced after issuance of the Senate Report, made divestment mandatory by commanding the FCC to "require" the consolidated carrier completely to divest itself of its international telegraph operations. *S.2445,* 77th Cong., 2d Sess. (1942).

> "Any proposed consolidation and merger of domestic telegraph carriers shall provide for the divestment by the consolidated domestic telegraph carrier of the international telegraph operations theretofore carried on by any party to the consolidation and merger, *and the Commission shall require,* either at the time of the approval of such consolidation and merger or within such reasonable time as it may thereafter specify, *that such consolidated carrier completely divest itself of all such international telegraph operations.*" *Ibid* (emphasis added).

The Senate Committee substituted and the Senate passed S.2598, which was even more emphatic in making divestment unconditional and which was the version ultimately enacted as Section 222. *S.2598,* 77th Cong., 2d Sess. (1942). The FCC was given discretion solely with respect to the time by which divestment was to occur, the adequacy of consideration and other incidental matters. In pertinent part, S.2598 provided, as does Section 222(c)(2):

> "Any proposed consolidation or merger of domestic telegraph carriers shall provide for the divestment of the international telegraph operations theretofore carried on by any party to the consolidation or merger, within a reasonable time to be fixed by the Commission, after the consideration for the property to be divested is found by the Commission to be commensurate with its value, and as soon as the legal obligations, if any, of the carrier to be so divested will permit. The Commission shall require at the time of the approval of such consolidation or merger that any such party exercise due diligence in bringing about such divestment as promptly as it reasonably can." *S.2598,* 77th Cong., 2d Sess. (1942).

Thus, respecting divestment, Congress specificially denied the FCC the broad discretion which it otherwise has in regulating the communications industry.*

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* S.2598 differed from S.2445 also in its treatment of the international carriers. S.2445 authorized mergers of both the domestic and the international carriers, with the merged domestic carrier being required to divest its "international telegraph operations theretofore

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The House of Representatives initially did not agree to the mandatory divestment requirement of S.2598. The House Committee on Interstate and Foreign Commerce considered that WUTelCo's long term contracts covering its international cables were not readily susceptible to divestment and that divestment, although desirable, was impractical. The House Committee thus favored a bill that authorized a merger between WUTelCo and Postal Telegraph without requiring the merged domestic carrier to divest its international operations. *H.R. Rep. No. 2664,* 77th Cong., 2d Sess. 2, 7 (1942).

The 77th Congress expired before any final action could be taken, but these different treatments carried forward into the next session of Congress. Compare *S.158,* 78th Cong., 1st Sess. (1943) and *S. Rep. No. 13,* 78th Cong., 1st Sess. (1943) with *H.R. Rep. No. 69,* 78th Cong., 1st Sess. 2 (1943). A Conference Committee resolved the difference by reporting out the Senate bill without any change, and that bill subsequently became Section 222. The Conference Report explained that both the Committees of the House and Senate had considered divestment in the public interest and that they had to resolve the principal difference between them, whether or not a divestment could be practically accomplished. The House Conferees ultimately were persuaded to the Senate view that divestment could be achieved if WUTelCo was allowed a reasonable time to accomplish it. *H.R. Rep. No. 142,* 78th Cong., 1st Sess. 11 (1943).*

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carried on" and the merged international carriers being required to divest their "domestic telegraph operations theretofore carried on." The Department of the Navy urged that wartime considerations favored maintaining the *status quo* as far as international telegraph operations were concerned, *S. Rep. No. 1490,* 77th Cong., 2d Sess. 8 (1942), and S.2598 therefore dropped the feature of the bill permitting consolidations among international telegraph carriers and mandating divestment of their domestic telegraph operations. *S.2598,* 77th Cong., 2d Sess. (1942).

* Section 222(c)(2) requires divestment "within a reasonable time to be fixed by the Commission," and "as soon as the legal obligations, if any, of the carrier to be so divested, will permit." 47 U.S.C. § 222(c)(2).

Congress' insistence on divestment shines forth from this legislative history, despite the difficulties and complexities of divestment. If WUTelCo and Postal Telegraph wished to merge, their domestic monopoly would be allowed only upon condition that WUTelCo divested itself of its international telegraph operations. As discussed earlier, the FCC's discretion was limited. It was not to decide whether or not WUTelCo should divest, for Congress had decided that issue. The FCC's primary role was only to implement that decision by determining if WUTelCo was exercising due diligence in attempting to effectuate the divestment within a reasonable time.

2. *Congress intended that WUTelCo should divest itself of, and not thereafter engage in, international telegraph operations, in order to eliminate the unfair competitive advantage which WUTelCo otherwise would have over the international carriers.*

From the outset of the Congressional deliberations, the FCC recommended to Congress that WUTelCo should not be permitted to engage in international telegraph operations following the merger with Postal Telegraph. For example, the FCC's 1939-40 Report stated:

> "If approval of a consolidated plan should result in the creation of a single domestic telegraph carrier and more than one international carrier . . . it is obvious that the single carrier controlling its field should have no relation, financial or otherwise, with any one of the carriers in the other field." *1939-1940 FCC Report on the Telegraph Industry"*, Part 2, *Hearings pursuant to S. Res. 95, supra at* 475.

FCC Chairman James L. Fly and FCC Commissioner Clifford Durr, in graphic terms, warned that a domestic monopoly would have "the power of life or death" over the international carriers.

> "Many of the international carriers in stating their position with respect to the domestic merger, point-

> ed out that the merged domestic carrier would have the power of life or death over the unmerged international carriers, and this is undoubtedly true, because much, perhaps most, of the international business originates on the domestic lines." *Hearings pursuant to S.2598 Before a Subcomm. of the House Committee on Interstate and Foreign Commerce*, 77th Cong., 2d Sess. 25 (1942) (remarks of FCC Chairman Fly).
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> "It is, thus, clear that the international carriers do not exaggerate when, in stating their views about domestic merger, they claim that the domestic monopoly will have the power of life or death over the unmerged international companies." *Id.* at 178 (remarks of FCC Commissioner Durr).

FCC Chairman Fly urged that there would be insurmountable problems unless the merged domestic carrier was compelled to relinquish its international ties.

> "[W]e do not want the domestic company to have any international arrangements, that is, any international properties or operations. There are so many difficulties there that we do not think it is wise to have such a tie-in. . . . I think that they ought to be severed from any international operations and leave those operations to entire separate and independent companies." *Hearings pursuant to S.2598 supra* at 16.*

Similarly, FCC Commissioner Durr testified that "there is no substantial disagreement anywhere—that the domestic combination should go out of the international business" in order to eliminate the inherently unfair competitive advantage which it otherwise would have over the international telegraph companies. *Hearings pursuant to S.2598, supra* at 180.

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* *Accord, Hearings on S.2445 Before the Senate Committee on Interstate Commerce*, 77th Cong., 2d Sess. 258 (1942) (remarks of FCC Chairman Fly).

> "[T]he problem of distributing traffic to the international carriers by the domestic monopoly is infinitely more complicated so long as that domestic monopoly competes for international business with an ununified international industry. For, added to all other complications of traffic distribution . . . is the factor of self-interest which might influence the domestic monopoly to prefer its own international department over its competitors in the international field." *Id.* at 180.

The FCC thus was frank to concede that the problem could not be controlled by its regulatory jurisdiction. Divestment was the necessary remedy.

Congress agreed. For example, the 1941 Senate Report stated:

> "In view of the fact that this Company [WUTelCo] also is a major overseas cable operator, under such an eventuality its control over pick-up and delivery facilities within the United States would seriously impair the operation of its competing international carriers." *S. Rep. No. 769,* 77th Cong., 1st Sess. 20 (1941).

Senator Ernest W. McFarland, one of Section 222's sponsors, in introducing the final version of the bill, stated:

> "Paragraph (2) of this subsection [(c)] provided for the divestment by the merged carrier of any international operations which it was carrying on, so that the merged carrier would not be put in a position to compete unfairly with other international carriers by giving preference to its own international lines." 89 Cong. Rec. 1092 (1943).

Also see *H. R. Rep. No. 142,* 78th Cong., 1st Sess. 11 (1943) ("divestment would be desirable in the public interest").

There is thus no doubt that Congress and the FCC intended that the merged domestic carrier would have to sever all interests in international telegraph operations. The FCC Order, indeed, repeated this conclusion, stating:

> "Thus, WU [WUTelCo] was in a position virtually to drive an international carrier or carriers out of business were it so inclined. . . . We agree . . . that a construction of the divestment provision which would permit WU to re-enter the same international operations the day after it divested its prior operations would render the requirement meaningless and absurd." (A45-46)

The FCC held, however, without taking evidence or hearing argument, that with respect to mailgrams "we see no potential for abuses by WU [WUTelCo] of the type that concerned Congress in enacting the divestment clause" (A22) and "we cannot assume that any competitor will act unfairly" (A22). The FCC thus made a determination which the Congress, when it enacted Section 222, preempted. Moreover, the FCC's unauthorized determination is illogical. If WUTelCo were given the right to furnish mailgram service to Hawaii, it could as easily divert customers to mailgrams today as it diverted telegrams from the international carriers prior to divestment.* The FCC, apparently recognizing this "potential for abuse," seems to believe that it can obviate the danger by holding out the

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* It seems that WUTelCo has already begun that campaign, by soliciting potential correspondents in Europe and elsewhere and urging the advantages of dealing with a carrier that has both domestic and, it hopes with mailgrams, international capability. In the lawsuit brought by WUI to enjoin WUTelCo from violating the covnant not to compete in the divestment agreement (see *supra* p. 3, fn. 3), a WUTelCo officer stated:

> "Both the Telegraph Company [WUTelCo], and on information and belief other international carriers including Plaintiff, [WUI], have had preliminary discussions with various foreign postal administrations in Europe and elsewhere looking toward the future establishment of operating arrangements for the provision of International Mailgram or a similar service. A number of foreign administrations have indicated to the Telegraph Company that they would prefer to deal exclusively with a single carrier capable of providing such service throughout the entire United States." Affidavit of Richard C. Hostetler, sworn to October 17, 1975, para. 6, filed in *Western Union International, Inc.* v. *Western Union Telegraph Co.*, 75 Civ. 3783 (C.E.S.) (S.D.N.Y.).

possibility that it will "authorize only one carrier" to provide mailgram service to Hawaii. (A22) But, whether one or several carriers are authorized, the potential for abuse exists. If WUTelCo is the only carrier, its personnel could divert public message traffic to mailgram traffic, thereby enhancing an already existing tendency. (A27, fn.) If other carriers are permitted to provide this service in addition to WUTelCo, WUTelCo's ability to prefer its own operations in distributing traffic, by the FCC's own earlier statements, cannot be satisfactorily policed. The potential for abuse thus exists in the same way as it did when Section 222 was enacted in 1943.

3. *The phrase "theretofore carried on" was not intended to limit the divestment requirement.*

The phrase "theretofore carried on" appeared originally in S.2445, (77th Cong., 2d Sess. (1942)) which would have permitted both the domestic and the international carriers, respectively, to merge, and would have required the merged domestic carrier and the merged international carrier to divest themselves, respectively, of international and domestic telegraph operations "theretofore carried on." S.2598 (78th Cong., 1st Sess. (1942)) and S.158 (78th Cong., 2d Sess. (1943)) deleted the international merger features, but retained the words "theretofore carried on" with respect to the divestment requirement imposed on the merged domestic carrier.

Congress intended originally to create two monopolies to carry on domestic and international telegraph operations, respectively. To achieve this separation, it would have been necessary for each merged carrier to divest itself of all aspects of the other's field of operation it was "theretofore" carrying on, completely and permanently. Re-entry by either into the other's sector would have negated the concept of two separate monopolies. When, later, the scheme of the proposal was changed to create only a domestic, and not an international, merger, the "theretofore carried on" language remained to describe what the domestic carrier

had to divest with regard to its international telegraph operations. Since Congress did not express a view that the scope of the business to be divested should change, it follows that Congress continued to intend that all of the international telegraph operations of the domestic carrier should be permanently divested.

Congress did not elaborate on what it meant by "theretofore carried on." The Senate Report which introduced S.2445, the first bill that required the merged domestic carrier to divest its international operations, equated the phrase "theretofore carried on" to "it may carry on," thereby using past and future tenses interchangeably. *S. Rep. No. 1490, supra.* The Report characterized S.2445 as a bill providing for "the divestment by the merged or consolidated domestic telegraph carrier of any international telegraph business *"it may carry on."* *Id.* at 9 (emphasis added). The FCC Order, upon noting this commentary, concluded that the phrase "theretofore carried on" "is no more than a descriptive phrase" describing that which WUTelCo was required to divest. (A43) We agree.

WUTelCo took 20 years to divest itself of its international telegraph operations. It then divested *all* international operations it then was conducting including, for example, telex operations, a service it had not performed in 1943. Obviously, WUTelCo in 1963 did not view the "theretofore carried on" phrase as a limitation on its obligation.* There is no warrant now to wrench the phrase out of context and give it an unintended meaning of decisional significance.**

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* In 1962, for example, WUTelCo told Congress that the effect of divestment would be to in "the long run" confine WUTelCo to only domestic telegraph service, and not international service. *Hearings on S.3646 Before the Senate Commerce Committee,* 87th Cong., 2d Sess. 8 (1962). See *infra,* pp. 40-43 for a more extended discussion.

** This Court's disapproval of the practice of construing statutes from a reading of isolated words without regard for the statute's purpose is well known. E.g. see *Schwartz* v. *Romnes,* 495 F.2d 844, 848-49 (2d Cir. 1974); *Guiseppi* v. *Walling,* 144 F.2d 608, 624 (2d Cir. 1944) (Learned Hand, J.) (concurring opinion), *aff'd sub nom. Gemsco, Inc.* v. *Walling,* 324 U.S. 244 (1945); also see *Tidewater Oil Co.* v. *United States,* 409 U.S. 151, 157 (1972).

4. *Section 222 was intended, not as an ad hoc remedy for the problems of the telegraph industry in 1943, but as ongoing legislation designed to deal with telegraph operations then in existence and those which would come into being as a result of technological change.*

The FCC Order stated that Section 222 "simply was seeking to remedy the problems which were facing the troubled telegraph industry in 1943" (A 17), and that Congress "gave no indication of an intent to legislate for future situations involving different technology and service patterns." (A 44) The FCC, more specifically, stated that "Congress could not expect that teletypewriter exchange service (Telex and TWX) or leased channel services . . . would in later years become the dominant services and that the revenues therefrom would grow at such a tremendous rate." (A 44) The FCC therefore concluded that Congress intended to affect only public message service (that is, telegrams). (A 46)

The FCC misread the legislative history of Section 222, and reached an unwarranted, restrictive interpretation of the statute. The reports and hearings which led to the enactment of Section 222, as well as the language of the statute itself, show clearly that Congress intended to cover the problems which the telegraph industry could expect to encounter in the future due to developments and changes in the industry, as well as the problems which existed in 1943.

The FCC initially recommended merger to Congress in 1935 because the FCC anticipated "greater technological improvements" would be made possible.

> "Greater technical improvements should follow consolidations in the telegraph field. . . . We believe that the pooling of the engineering and inventive skill in the service of the various telegraph companies, together with the pooling of the funds which

> they can devote to research, will result in greater improvement than will a continuance of the present competitive conditions." *Recommendations of Three Proposed Amendments to the Communications Act of 1934, H.R. Doc. No. 83, supra* at 5.

Congress and the FCC expressed awareness that TWX and leased channel services soon would overshadow public message service. FCC Chairman Fly testified in 1941 that the TWX system and leased channel services of A.T.&T. accounted for 16.5% of the entire domestic telegraph industry, a share "second only to that of Western Union [WUTelCo]," and that any legislation which failed to consider the development of such services would contain "the seeds of its own destruction." *Hearings pursuant to S. Res. 95, supra* at 5, 19 (1941). He warned that if Congress enacted a limited statute that did not take into account the probability of future changes and developments in the industry, "we are likely to be back here in another decade."

> "This TWX thing is good, and it is effective. Their [i.e., the Bell System's] leased wire service is rather extensive. Both together can just quietly move out and cut terrifically into the telegraph business. It has done it in the past; it can do it more in the future. There are no very satisfactory, obvious limitations upon it. I do not mean to suggest that anything should be done to impair that service, but it strikes me that in trying to save the telegraph industry and to set up one healthy company, with something like a healthy assured future for the employees, for the public, and for everybody else concerned, we should not set it up with such limitations as would, in effect, be the seeds of its own destruction. I do not want to overemphasize the point, but it does occur to me that if you set up a so-called telegraph monopoly with that limitation and with that deficiency in there always gnawing away at it, we are likely to be back here in another

> decade, telling you the same sort of different story." *Hearings pursuant to S. Res.* 95, *supra* at 234.*

The FCC Order did not consider any of the above expressions or those referred to in the footnote below.

Furthermore, Section 222 on its face specifically provided for the ongoing restructuring of the telegraph industry to take account of TWX and leased private channels. Section 222(b)(1) provided the basis for WUTelCo also to acquire the TWX and leased channel telegraph operations of A.T.&T., either at the time WUTelCo merged with Postal Telegraph or at some later date.

> "It shall be lawful, upon application to and approval by the Commission . . . for any domestic telegraph carrier, as a part of any such consolidation or merger or thereafter, to acquire all or any part of the domestic telegraph properties, domestic telegraph facilities, or domestic telegraph operations of any carrier which is not primarily a telegraph carrier." 47 U.S.C. § 222(b)(1).

WUTelCo acquired TWX in 1971. It has not yet acquired A.T.&T.'s leased channel services, but the ongoing nature of section 222 gives WUTelCo the opportunity to make such acquisition. The FCC, in authorizing the TWX acquisition, recognized that Section 222 was intended to subsume more than just public message service.

> "The study of the telegraph industry in 1941 [Sen. Rep. No. 769, 77th Cong., 1st Sess.] was a thorough and complete report. . . . 'Unless the telegraph enterprise is granted the full commercial exploitation of the teletypewriter and leased wire facilities, competition from this source eventually will harm seriously the competitive position of any telegraph carrier. . . .' As a result of this study, Section 222 was

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* See also the statements of FCC Commissioner Craven, concurring in the above view expressed by Chairman Fly, *Hearings pursuant to S.Res. 95, supra* at 219; the discussion between Senator McFarland and FCC Commissioner Durr, *Hearings on S.2445, supra* at 12, and Chairman Fly's additional testimony, *Hearings pursuant to S. Res. 95, supra* at 19.

enacted." *Western Union Telegraph Co.*, 24 F.C.C. 2d 664, 667 (1970).

Section 222, therefore, is not the limited, *ad hoc* legislation the FCC would now like to make it. It was intended to be, and is, a vital and ongoing charter governing the structure of the telegraph industry. There is no rational basis that could justify an exception for mailgrams, which in any event do not constitute a "new" service.

5. The pre-1943 legislative history summarized.

The pre-1943 legislative history shows a deep concern by Congress about WUTelCo's "life or death" stranglehold on the international carriers arising from WUTelCo's domestic monopoly. Congress determined that WUTelCo should not retain any interest in international telegraph operations, and it mandated that WUTelCo divest itself of all that it had with respect to such operations, whether of a pre-1943 vintage or that which it might acquire or develop later. The FCC was not to have a say concerning the question whether or not WUTelCo should have an interest in international telegraph operations, and, once out, WUTelCo could not re-enter an international telegraph operation.

B. The FCC Order is irreconcilable with earlier decisions of the Courts of Appeals and the FCC.

This is not a case of first impression, as the FCC labels it. (A 16-17) This Court twice before was asked by WUTelCo to relax its obligations under Section 222, and each time, applied the Congressional purpose to check the potential for abuse inherent in WUTelCo's position as the sole domestic telegraph carrier. In a different setting, the Court of Appeals for the District of Columbia was asked to find that mailgrams are a distinct type of service and, siding with WUTelCo, found that mailgrams essentially are indistinguishable from traditional telegrams. The FCC disregarded these decisions, and misread its own precedents.

1. The FCC disregarded the ruling of this Court which applied Section 222 to check WUTelCo's potential for abuse.

(a) In 1954, WUTelCo was before this Court as a result of its attempt to evade the formula which, pursuant to Section 222(e) of the Act, the FCC prescribed in order to prevent discrimination by WUTelCo in allocating traffic among the international carriers (of which its own Western Union Cables Division then was one). *Western Union Telegraph Co.* v. *United States,* 217 F.2d 579 (2d Cir. 1954). Under the formula, each international carrier had quotas governing the allotment of communications traffic originating on WUTelCo's domestic system and destined to the overseas geographic areas that each carrier served. WUTelCo was required, under the formula, to distribute traffic, first, by routing communications to carriers whose facilities customers had specifically instructed should be used and, second, by allocating the unrouted communications until the formula quotas for each carrier were satisfied.

Two of the smaller international carriers served areas to which WUTelCo's international telegraph operations did not extend and, with respect to which, WUTelCo was not entitled to quota allotments. Customers of WUTelCo frequently specified, however, that "Western Union Cables" should be the medium of transmission to these areas. WUTelCo seized upon this preference expressed by the public, made a special deal with these two international carriers, and gave them the communications to the areas it did not serve itself without regard to the quota distribution system and for fees "vastly in excess of the charges assessed by other carriers for the performance of similar services." 217 F.2d at 583.

The FCC and, on petition for review, this Court struck down WUTelCo's practice. The formula was devised to protect the international carriers against over-reaching on the part of WUTelCo by taking advantage of its monopoly position. This Court rejected WUTelCo's argument that

the formula permitted it, indirectly through contracts with other carriers, to engage in international telegraph operations in which it did not engage before the enactment of Section 222. The formula was intended to govern all the international telegraph operations of WUTelCo, those that existed prior to enactment of Section 222 in 1943, and those that might be developed or acquired thereafter. Any other conclusion, this Court found, would be "ridiculous".

> "It is ridiculous to suppose that the Formula contemplated strict surveillance of contemporary competition without also intending to limit the dangers of 'Western Union Cables' expansion in the future." 217 F.2d at 582.

(b) In 1958, an FCC order in *Western Union Telegraph Co.*, 25 F.C.C. 35 (1958), found extensive abuses by WUTelCo of its monopoly position in spite of the formula and imposed a December 31, 1958 deadline for the submission by WUTelCo of a plan of divestment of its international telegraph operations. WUTelCo again petitioned to the Second Circuit for review, contending that no feasible method of divestment existed and that the FCC was without power to compel WUTelCo to submit a plan by an absolute date. This Court substantially rejected these contentions, holding that WUTelCo could not complain about being pressed to proceed with divestment "[i]n the face of the years that have gone since the Commission's original order of September 27, 1943" which approved the WUTelCo—Postal Telegraph merger and directed WUTelCo to exercise due diligence in bringing about the divestment of its international telegraph operations "as promptly as it reasonably can." *Western Union Telegraph* v. *United States,* 267 F.2d 715, 721, 725 (2d Cir. 1959).*

* The Commission's original order in 1943 provided that the divestment should occur "in no event later than 1 year" from the September 27, 1943 date of the order, subject to extensions upon a showing that the time limit was unreasonable and due diligence was being exercised. *Application for Merger,* 10 F.C.C. 148, 171 (1943). That one year became twenty, "due to the laches of the carrier [WUTelCo] and its apparent disposition to raise obstacles to compliance with Section 222 and the Commission's orders thereunder. . . ." *Western Union Telegraph Co., supra,* 25 F.C.C. at 86.

Noting the legislative history of Section 222, the Court, while reversing the unconditional deadline imposed by the FCC, firmly restated the need for WUTelCo to sever its interests in international telegraph operations. The Court stated:

> "Continuing ownership and operation of Western Union cables [WUTelCo's international telegraph operations], along with virtual monopoly of the landlines, cannot but hinder fair and equitable administration of the 'formula' adopted pursuant to § 222(e)(1) of the Act. (47 U.S.C.A. § 222(e)(1)); see *Western Union Telegraph Co.* v. *United States,* 2 Cir., 1954, 217 F.2d 579." 267 F.2d at 725.*

In the proceedings WUTelCo did not claim any distinction between its international telegraph operations that existed before, and those came into being during the sixteen years since, 1943. WUTelCo thus conceded that its obligation to divest encompassed all international telegraph operations, whether or not they were "theretofore carried on" in 1943.

2. *The FCC disregarded a decision of the Court of Appeals for the District of Columbia, holding that mailgrams are indistinguishable from other telegram services.*

The United States Court of Appeals for the District of Columbia, in a case involving mailgrams, also ruled against the position now advocated by WUTelCo and the FCC. *United Telegraph Workers, AFL-CIO* v. *FCC,* 436 F.2d 920 (D.C. Cir. 1970). Under Section 214 of the Communications Act, a telegraph carrier is not permitted to acquire a "new" line of communication, or an extension of

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* Concerning the legislative history of Section 222, the Court said:

> "In the hearings which preceded enactment in 1943 of § 222 of the Communications Act [47 U.S.C.A. § 222], under which the merger of Western Union and Postal became legally permissible despite the Federal antitrust laws, concern was voiced that the merged company, through ownership of the single remaining nation-wide landline telegraph system, would be in a position to control the distribution of outbound international telegraph traffic and to favor its own international cable facilities." 267 F.2d at 718.

a line, unless the FCC grants the carrier a certificate of public convenience, that is, a certificate that the new line is in "the present or future public convenience and necessity." 47 U.S.C. § 214(a).*

In *United Telegraph Workers, AFL-CIO* v. *FCC, supra*, the employees of WUTelCo complained about a tariff filed by WUTelCo to institute mailgram service domestically, within the United States Mainland. They contended that mailgrams constituted a "new" communications service, different from traditional telegram service, and consequently, that a tariff could not become effective until the procedures of Section 214 were satisfied. The FCC held that mailgrams were not "new" and that Section 214 did not require either a hearing or a certificate of public convenience. The FCC argued:

> "Not only does the transmission portion of MAILGRAM require no new construction or installation of facilities, but *the service itself is indistinguishable from other services now available on Western Union's [WUTelCo's] interstate network.*" FCC Brief, p. 18 (emphasis added).

The District of Columbia Court of Appeals affirmed the FCC. The Court held that Section 214 did not apply because "some more substantial change in existing services than is present here" is required in order to deem a telegraph service "new". 436 F.2d at 924. The Court was unable to see any meaningful novelty about mailgrams.

> "Indeed mailgram is not much of a step beyond the common and traditional practice of delivering copies of telegrams through the Mail." 436 F.2d at 923.

The Court of Appeals noted that the use of the mails is not sufficiently different to justify distinguishing mailgrams from other telegrams.

> "[T]he mails are currently used to send confirmatory copies of telegrams delivered by telephone or wire. All Mailgram does is to place receiving teleprinters in post offices so that messages can be

* The pertinent provisions of Section 214(a) are reproduced following the Table of Contents of this brief.

> sent long distances by Western Union [WUTelCo] wire and then delivered in ordinary course as local mail. This limited and temporary combination of existing facilities does not rise to the magnitude of a new line or channel of communication requiring certification." 436 F.2d at 924-26.

As previously noted (*supra,* p. 6), the operational facts about mailgrams are substantially the same today as they were five years ago at the time of the above holding by the District of Columbia Court of Appeals. The acceptance, transmission, switching and facilities for mailgrams are substantially the same as for other telegrams. While mailgrams are delivered by mail, many other telegrams, likewise, are frequently delivered by mail. As the FCC Order noted (A25, fn.), both mailgrams and overnight telegrams are delivered by mail, generally on a next-day delivery basis. Where, because of time zone changes, mailgrams can be delivered on the same day they are filed, they resemble the full-rate telegram.

Moreover, prior to the 1943 enactment of Section 222, WUTelCo offered a rudimentary international mailgram service to London and Brussels under a different label. In 1939 WUTelCo filed a tariff with the FCC to provide a service by which greeting messages regarding the 1939 World's Fair could be transmitted by cable from New York City to London and Brussels, and mailed on postcards from those cities. *FCC Tariff No. 204* (July 27, 1939). Additionally, it is noteworthy that the transmission of international telegraph communications commonly requires the use of the mails to serve areas beyond international telecommunication channels. The major international treaty respecting telegram messages provides:

> "A sender who wishes his telegram addressed to a locality beyond the international tele-communications channels, to be forwarded by post, must write, before the address, the paid service indication: =Poste= if the telegram is to be forwarded as an ordinary letter; =PR= if the telegram is to be for-

> warded as a registered letter; =PAV= if the telegram is to be forwarded by air-mail; =PAVR= if the telegram is to be forwarded by registered air-mail." *Telegraph Regulations (Geneva Revision, 1958), Annexed to the International Telecommunication Convention (Buenos Aires, 1952)*, Art. 59, para. 579, at p. 83.*

The distinctions relied upon by the FCC to differentiate mailgrams from other telegrams, other than the form of delivery, are also insignificant. The distinction which the FCC drew "as to rate levels and as to pricing practices" (A26-27) contradicts an FCC ruling that "[l]ike services are not made different services merely because the level or structure of rates is different." *TELPAK*, 37 F.C.C. 1111, 1114 (1964). The feature that requires WUTelCo to refund the charge for a telegram delivered late (A24-25) was imposed by the FCC in 1971 in an attempt to arrest service deterioration, see *Western Union Telegraph Co.*, 30 F.C.C. 2d 723 (1971). It could just as easily be imposed with respect to mailgrams and, in any event, is hardly a difference that justifies a legal distinction regarding whether so important a statute as Section 222 should be applied.

Thus, there is no rational basis for the FCC's conclusion that "Mailgram service constitutes a new and distinctly different service from public message telegraph service . . ." requiring a different treatment under Section 222. (A21) The FCC simply drew distinctions not based on meaningful differences. Without having held a hearing or having heard the argument of counsel, it disregarded the expertise of the Common Carrier Bureau and precedents of two Courts of Appeals.

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* For a contemporary view by WUTelCo concerning the use of the mails for telegraph messages, reference is made to a letter dated November 28, 1975 to the FCC by WUTelCo's Vice President, Consumer Affairs, Mary Gardiner Jones, which states:

> "It is my impression that prompt mailing of an inbound cable in London constitutes a valid delivery under the rules of carriers who terminate messages in that city. It is also my impression that most cables inbound to London do normally terminate via mail." FCC Reference 9520, T.S. 75-1330, WUTelCo Reference 11-01-75, 027.

3. *The FCC failed to follow the rationale of its own earlier decisions.*

The FCC's present decision avoids the reasoning of its own prior precedents interpreting Section 222. As the Supreme Court recently held in *United Housing Foundation, Inc.* v. *Forman,* 421 U.S. 837, 858-59 n.25 (1975), an administrative agency's view of the law is entitled to no special weight if a present view contradicts earlier positions. See also *Reliance Electric Co.* v. *Emerson Electric Co.,* 404 U.S. 418, 426 (1972).

(a) *The finding that WUTelCo's potential for abuse is beyond the FCC's capacity to check by regulation.* In 1952, the FCC began an investigation of WUTelCo's failure to divest itself of its international telegraph operations. The FCC considered whether or not to recommend to Congress that it amend Section 222 to eliminate the divestment requirement, and concluded that it should not do so. *Western Union Telegraph Co.,* 25 F.C.C. 35, 38, 87-89 (1958), *aff'd in part, rev'd in part, Western Union Telegraph Co.* v. *United States, supra,* 267 F.2d 715 (2d Cir. 1959). The FCC found that WUTelCo had used its monopoly over domestic telegraph operations to take unfair advantage of the international carriers, as Congress had feared it would do. After cataloguing for some 13 pages the abuses of WUTelCo, and recalling that "the primary concern of Congress was that the merged domestic company should not continue with its international telegraph operations" (25 F.C.C. at 78), the FCC concluded that divestment continued to be indispensable.

> "We think that it is manifest, from our extensive findings in this connection, that continued operation of the cables by Western Union [WUTelCo] gives rise to serious problems in the distribution of international telegraph traffic, and that such problems cannot be alleviated other than by divestment. Thus, the reasons that impelled Congress to require divestment of Western Union's [international] telegraph operations have been amply justified by experience under a combined landline-cable operation." 25 F.C.C. at 87.

Thus, the FCC acknowledged that the potential for abuse, inherent in WUTelCo's combined domestic-international capability, was beyond its capacity to check by regulation. WUTelCo's exclusive contact with the public in accepting and delivering telegraph traffic (except in the gateway cities) enabled it to prefer its own international operations. The FCC observed that WUTelCo's abuse of its unique position could be detected, if at all, only by constant monitoring and investigation, 25 F.C.C. at 58-71, which the FCC is not equipped to do.

The FCC now concludes differently. Without a hearing or otherwise taking evidence of a change of facts, the FCC disregards its prior concerns. It observes, "we see no potential for abuses" (A22), and "we cannot assume that any competitor will act unfairly" (A22). As previously discussed (*supra,* pp. 21-22), there is no logic to the FCC's present conclusion.

(b) *The finding that, absent amendatory legislation, WUTelCo cannot provide telegraph service to Hawaii, regardless of the FCC view of the public interest.* Shortly after the FCC's 1958 decision denying WUTelCo's plea to eliminate the divestment requirement, WUTelCo sought permission from the FCC to offer telegraph service between the United States Mainland and the new State of Hawaii. WUTelCo, which had no facilities to serve Hawaii, conditioned its application on a characterization of its service as "domestic", so that the operations relating to such service would not have to be divested as part of its international telegraph operations under Section 222(c)(2).

Thus, WUTelCo sought to perform telegraph services which it did not "theretofore carry on." Yet, neither WUTelCo nor, as discussed below, the FCC regarded this consideration as material. Disregarding whether the service to Hawaii was "theretofore" or "thereafter" carried on, the FCC ruled that WUTelCo was not permitted to offer it. The FCC held that telegraph service to Hawaii is "international" within the meaning of Section 222, and that it was without authority, because of the Congressional

command, to permit WUTelCo to engage in international telegraph operations "no matter how urgent the public interest." *Telegraph Service with Hawaii,* 28 F.C.C. 599, 602, 605, *aff'd on reconsideration,* 29 F.C.C. 714 (1960). To avoid doubt, the FCC recommended that Congress amend Section 222 to make it clear that Hawaii continues to be "international" notwithstanding the attainment of statehood. Congress acted on that recommendation and amended the statute accordingly. 47 U.S.C. § 222(a)(10).

In the instant case, the FCC's Common Carrier Bureau regarded *Telegraph Service with Hawaii, supra,* as controlling. (A67-68) The Bureau decided that it was bound by that case, where the FCC had held that Congress had withdrawn the FCC's power to authorize "overseas service by Western Union [WUTelCo]" regardless of what it considered was the public convenience or necessity.

> "[i]f we find that the public interest requires . . . the remedy is to ask Congress to amend Section 222, not for us to misinterpret it." 28 F.C.C. at 605.
>
> * * * * *
>
> ". . . Congress itself determined that such [international telegraph] operations were contrary to the public interest. Under these circumstances, it in effect withdrew our power under Section 214 to authorize overseas service by Western Union [WUTelCo] as part of its domestic operations even if we believed such service to be required by the public convenience or necessity." 29 F.C.C. at 715.

The FCC now asserts that its earlier decision was limited to "PMS and other similar services" of a pre-1943 vintage. (A55) The distinction is without merit. Nothing in the legislative history, or in the *Telegraph Service with Hawaii* decisions or in the statute gives rise to a rational basis for distinguishing between PMS and mailgrams. Indeed, in *Telegraph Service with Hawaii,* the FCC noted that WUTelCo itself explicitly indicated "that it plans to offer telegraph message, telex, leased facility, and money order services between the mainland and Hawaii." 28 F.C.C. at 609.

(c) *The finding that Section 222 forbade WUTelCo to have even an indirect interest in international telegraphy.* In 1961, when WUTelCo finally submitted a divestment plan to the FCC, WUTelCo attempted to retain a non-controlling and non-voting stock interest in WUI. The FCC denied WUTelCo's request, holding that Section 222 embodies "the Congresssional desire *to divorce completely* Western Union's virtual landline monopoly, following the merger, from all financial interest in international telegraph operations." *Western Union Divestment,* 30 F.C.C. 323, 340 (1961), quoting the Second Circuit in *Western Union Telegraph Co.* v. *United States, supra,* 267 F.2d at 723 (emphasis added). By so holding, the FCC ruled that Section 222 prohibited WUTelCo from participating, even indirectly, in the international operations WUI might *thereafter* carry on. The FCC now seeks to change its view of what Congress intended.*

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* The FCC cited two of its recent decisions, *American Satellite Corp.*, 43 F.C.C. 2d 348, 353-54 (1973) and *RCA Global Communications, Inc.*, 42, F.C.C. 2d 774, 780 (1973), in support of its present construction of Section 222. (A 21) Both of those decisions permitted "international telegraph carriers" to acquire interests in satellite communication companies offering specialized communication service. The divestment provision of Section 222(c) was not in any way involved in those decisions because the international carriers never have been under any obligation to divest. The only question there before the FCC was whether the Section 222(b)(1) proviso against mergers between domestic and international telegraph carriers applied. The FCC concluded that this proviso did not apply because the satellite companies did not meet the statute's definition of "domestic telegraph carriers". The FCC's holding in the two cases is best expressed in the following quotation from *American Satellite Corp.:*

> "The legislative intent was not to protect Western Union [WUTelCo] from competition in the domestic communications market. Rather it was the intent of Congress to preserve the then existing competition in international communication which otherwise might be lessened or extinguished by the creation of the domestic telegraph monopoly authorized by Congress." *American Satellite Corp., supra,* 43 F.C.C. 2d at 354.

The two cases are distinguishable on a number of grounds and are inapposite to the FCC's earlier direct holdings discussed above.

C. Congress, and WUTelCo in appearances before Congress, confirmed, between 1945 and 1963 that Section 222 was intended to exclude WUTelCo permanently from all international telegraph operations.

Congress was asked to reconsider or modify the divestment requirement of Section 222 on a number of occasions between 1945 and 1963. Each time, Congress confirmed its original intention to exclude WUTelCo from international telegraph operations.*

(a) In 1945, a Subcommittee of the Senate Committee on Interstate and Foreign Commerce considered again if the international telegraph companies should be encouraged to consolidate. The Subcommittee also considered again the divestment requirement imposed on WUTelCo by Section 222. Paul A. Porter, the then Chairman of the FCC, testified that the purpose of the divestment requirement was to *eliminate* "the favored competitive position of the domestic landline company". Mr. Porter said:

> "That provision [§222(c)(2)] has as its purpose the elimination of the favored competitive position of the domestic landline company in relation to the international carriers who do not have facilities in any way comparable to those of the domestic company for the handling of international traffic within the United States." *Hearings on S.187 Before a Subcomm. of the Senate Committee on Interstate and Foreign Commerce,* 79th Cong., 1st Sess. 122 (1945).

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* Congressional ratification of prior acts, and confirmation of earlier intention, is a helpful guide to the proper interpretation of a statute. See, e.g., *National Automatic Laundry and Cleaning Council* v. *Schultz,* 443 F.2d 689, 705 (D.C. Cir. 1971) ("Congressional rejection of certain limiting amendments" and "presentation at the hearings of the problem requiring legislative action" illuminate the broad legislative intention); *Power Reactor Devel. Co.* v. *International Union of Electrical Radio and Machine Workers, AFL-CIO,* 367 U.S. 396, 413-14 (1961) (any doubt about the meaning of a statute should be resolved consistent with the "administrative practice, made known to Congress many times and never disturbed by it"); *Canada Packers, Ltd.* v. *Atchison, Topeka and Santa Fe Railway Co.,* 385 U.S. 182, 184 (1966) (". . . Congress, which could easily change the rule, has not yet seen fit to intervene . . .").

The Senate Committee on Foreign and Interstate Commerce nevertheless recommended, in its 1947 Report, that the divestment requirement be relaxed. The Report recommended that Congress either repeal the divestment mandate because WUTelCo apparently could not find a viable divestee other than an existing international carrier who was ineligible under the antitrust laws, or authorize the international carriers to merge into a monopoly which, in turn, could acquire WUTelCo's international operations. *S. Rep. No. 19,* 80th Cong., 1st Sess. 7-8 (1947). Congress did not act to extinguish WUTelCo's obligation to divest.

(b) In 1959, Congress once again considered the advisability of legislation permitting a merger among international carriers to facilitate WUTelCo's compliance with the divestment requirement of Section 222. The FCC advised Congress that WUTelCo was required to divest all its international telegraph operations (not simply those it "theretofore carried on" in 1943).

> "[A]t present Western Union [WUTelCo] is required to divest itself of *all of its international telegraph operations* pursuant to the terms of Section 222(c)(2). . . . Since there is a continuing requirement placed upon Western Union to effect *divestment of all its international operations,* it does not appear appropriate to include in the present bill any provisions which could be construed to permit the merged international carrier to acquire only a part of such operations and leave Western Union with other parts of such operations which it still would be under a mandate to divest." *Hearings on S.4231 Before the Senate Committee on Interstate and Foreign Commerce,* 86th Cong., 1st Sess. 11, 32 (1959) (emphasis added).

(c) In 1960, Section 222 was amended by Congress to make it clear that Hawaii was to remain outside the area allowed to WUTelCo. 47 U.S.C. § 222(a)(10). (See pages 35-36 *supra,* where we discussed WUTelCo's effort to persuade the FCC to permit it to expand its service to Hawaii

as part of its domestic monopoly, and the FCC's rejection of that effort.) Congress' amendment of Section 222 confirmed again that Section 222 was intended to remove WUTelCo from international telegraph operations, and specifically from such operations between the continental United States and Hawaii.

(d) In 1962, 19 years after the merger between WUTelCo and Postal Telegraph became effective, WUTelCo sought to gain the right to enter into international telegraph operations using a proposed international communications satellite. Such operation, of course, had not been "theretofore carried on" by WUTelCo prior to 1943. WUTelCo's testimony to Congress expressed its understanding that Section 222 forbade it to engage in such telegraph operations unless Section 222 was amended. We quote from the testimony of Samuel M. Barr, Vice President of Planning of WUTelCo, in hearings leading to the enactment of the Communications Satellite Act of 1962, 47 U.S.C. §§ 701 *et seq.*

> "Senator Kefauver: Do you think the bill should specifically provide that domestic carriers can use the [international] satellite?
>
> "Mr. Barr: Yes, sir.
>
> "Senator Kefauver: Then what right of use would you want, Mr. Barr?
>
> "Mr. Barr: I would want the right to utilize satellite channels for operations where I found it necessary and desirable to use them.
>
> "Senator Kefauver: That would mean, then, that the restriction on international business of your company in the 1943 Act would have to be removed?
>
> "Mr. Barr: If I am to provide that use as an international carrier, the answer is 'yes'. If you are looking at Western Union, after the fact, as purely a domestic carrier, then this question of the 1943 Act does not come into the picture. I would still want to use it as a domestic carrier, although I would prefer to use it as a complete domestic-international carrier, which I think we should be." *Hearings on S. 258, Before a Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee*, 87th Cong., 2d Sess. 455-56 (1962).

Mr. Barr's testimony gave rise to a bill that would have enabled WUTelCo once again to become both a domestic and an international carrier by repealing the divestment requirement of Section 222. FCC Commissioner Robert E. Lee testified against repeal. He reminded Congress of the 1943 finding by Congress that divestment was necessary to prevent WUTelCo from "discriminating in favor of its own [international] operation."

> "[T]he congressional committees concerned, the industry, and the Commission were consistently unanimous in their view that a divestment requirement should be an essential part of any bill authorizing a merger of domestic telegraph carriers. This position was based on the undeniable premise that so long as the domestic telegraph monopoly was a major factor in the international field, it would be difficult if not impossible to prevent it from discriminating in favor of its own operations." *Hearings on S. 3646 Before the Senate Commerce Committee,* 87th Cong., 2d Sess. 14 (1962).

Mr. Barr testified in support of repeal. He recognized that under Section 222 WUTelCo was to be confined to domestic service.

> "Senator Lausche: 'Now then, this law that was passed in the 40's declared that your business in the long run shall be confined to domestic service and not international. Is that correct?'
>
> Mr. Barr responding: 'That is correct.'" *Hearings on S. 3646, supra* at 8.

Mr. Barr testified further said that it had been "the thinking of the Congress . . . that Western Union [WUTelCo] should get out of the international field." *Hearings on S. 3646, supra* at 9-10.

The Senate Interstate Commerce Committee Report recommended repeal of the divestment requirement, contending that it was unwise to limit WUTelCo "to domestic communications operations" and to prohibit WUTelCo

"from operations in the international communications field."

> "The purpose of this legislation is to eliminate from the Communications Act, as amended, the requirement that Western Union [WUTelCo] divest itself of its international telegraph operations. If this divestment provision is not eliminated Western Union [WUTelCo] will be prohibited from operating in the international communications field and limited to domestic communications operations. *S. Rep. No. 1982,* 87th Cong., 2d Sess. 1 (1962).

Also see 108 Cong. Rec. 18778 (1962) (remarks of Senator Ernest McFarland). The Committee considered that changes in the competitive situation brought about by technological developments diminished the need for divestment that existed in 1943.

> "These technical developments have changed, and are continuing to change, the competitive situation and Western Union [WUTelCo] is today subject to competition in the domestic and international field [by A.T.&T.] that could not have been foreseen in 1943. Some of the considerations which led to the enactment of this restrictive [divestment] condition in 1943 may still be relevant. However, it is quite evident that conditions have changed so greatly since 1943 that other considerations outweigh those which led to the enactment of the divestiture provision. Permitting Western Union to engage in the international, as well as the domestic communications field, will provide it with an opportunity to compete effectively with other communications operations." *S. Rep. No. 1982,* 87th Cong., 2d Sess. 6 (1962).

The Committee Report considered it important that WUTelCo be permitted to compete internationally in "the sale of broadband services, which can be used for transmitting voice, record data, facsimile, or any other type of digital communications." *Id.* at 5. These were clearly not operations "theretofore carried on" before the enactment

of Section 222 in 1943, and more closely reflect the current state of the art than do mailgrams which employ the pre-1943 technique of postal delivery.

The repeal bill passed the Senate, but was not acted on by the House. Congress failed to repeal the divestment requirement.

(e) In 1963, WUTelCo made a last effort to achieve repeal, again without success. *S.253,* 88th Cong., 1st Sess. (1963). Finally, on September 30, 1963, it divested itself of *all* its international telegraph operations.

Congress thus repeatedly confirmed its intent that WUTelCo should not be engaged in international telegraph operations. WUTelCo recognized, and complained to Congress, that the divestiture clause prevented it from entering any kind of international telegraph operations, including forms of telegraph operations not existing in 1943. Congress nevertheless refused to repeal the divestment requirement of Section 222.

WUTelCo and the FCC, contrary to the understanding they expressed in testimony to Congress, now contend that they can accomplish their goal without amendatory legislation because mailgrams are not a telegraph service "theretofore carried on." But "satellite communications" and "broadband services" were not services "theretofore carried on" in 1943, and Mr. Barr of WUTelCo nevertheless stated that WUTelCo could not provide these internationally unless Section 222 was amended.

As the FCC held in 1960, if the public interest requires that WUTelCo be permitted to now engage in international telegraph operations, "the remedy is to ask Congress to amend Section 222," not for the FCC "to misinterpret it." *Telegraph Service With Hawaii, supra,* 28 F.C.C. at 605.

V. Conclusion

For the reasons stated, the FCC Order should be reversed and the FCC should be directed to reject WUTelCo's mailgram application.

New York, New York
December 12, 1975

Respectfully submitted,

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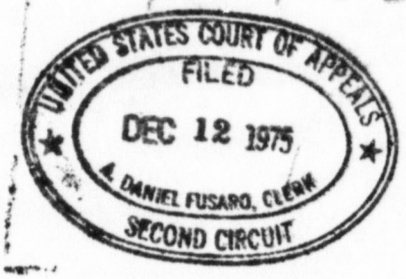

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

- -x

WESTERN UNION INTERNATIONAL, INC.,

Petitioner,

-against-

THE FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents,

-and-

THE WESTERN UNION TELEGRAPH COMPANY, STATE OF HAWAII, and ITT WORLD COMMUNICATIONS, INC.,

Intervenors.

- -x

Docket No. 75-4132

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JOSEPH DeCARLO, JR., being duly sworn, deposes and says:

1. Deponent is over the age of 18 years and is employed in the offices of STROOCK & STROOCK & LAVAN, attorneys for Petitioner in the above captioned matter.

2. That on the 12th day of December, 1975, he served the within Brief for Petitioner, Western Union International, Inc. on

the parties set forth below:

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at the addresses designated by said attorneys or the parties by delivering a true copy of same to offices of said attorneys.

Joseph DeCarlo Jr.
JOSEPH DeCARLO, JR.

Sworn to before me this

15th day of December, 1975.

Nettie Rothstein
Notary Public

NETTIE ROTHSTEIN
Notary Public, State of New York
No. 24-3379250
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1977

Docket No. 75-4132

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

WESTERN UNION INTERNATIONAL, INC.,
Petitioner,
-against-
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Respondents,
-and-
THE WESTERN UNION TELEGRAPH COMPANY, STATE OF HAWAII, and ITT WORLD COMMUNICATIONS, INC.,
Intervenors.

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25-4132

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

WESTERN UNION INTERNATIONAL, INC., Petitioner, -against- THE FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents, -and- THE WESTERN UNION TELEGRAPH COMPANY, STATE OF HAWAII, and ITT WORLD COMMUNICATIONS, INC., Intervenors.	Docket No. 75-4132 AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JOSEPH DeCARLO, JR., being duly sworn, deposes and says:

1. Deponent is over the age of 18 years and is employed in the offices of STROOCK & STROOCK & LAVAN, attorneys for Petitioner in the above captioned matter.

2. That on the 12th day of December, 1975, he served the within Brief for Petitioner, Western Union International, Inc. on

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at the addresses designated by said attorneys or the parties by depositing a true copy of same enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

Joseph DeCarlo, Jr.
JOSEPH DeCARLO, JR.

Sworn to before me this
15th day of December, 1975.

Nettie Rothstein
Notary Public NETTIE ROTHSTEIN
Notary Public, State of New York
No. 24-3379250
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1977.

Docket No. 75-4132

UNITED STATES COURT OF APPEALS

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